March 5, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	EverNu Technology, LLC
Date of Filing:	January 18, 2008
Case Number:	TFA-0243

On January 18, 2008, EverNu Technology (EverNu) filed an Appeal from a determination issued to it by the Department of Energy's Office of the General Counsel (OGC). In that determination, OGC withheld information in response to a request for information that EverNu filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OGC to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.

I. Background

On October 3, 2007, EverNu sent a FOIA request to the FOIA Office at DOE Headquarters, for a memorandum dated on or about February 17, 2006, regarding EverNu Technology, LLC. E-mail from EverNu Technology to FOIA Officer, Department of Energy (October 3, 2007) (FOIA Request). By letter dated October 5, 2007, the Director of DOE's Headquarters FOIA Office (DOE/FOI) informed EverNu that the request was assigned to the Office of Energy Efficiency and Renewable Energy (EERE). EverNu contacted DOE/FOI to inform them that the responsive document was located in the Office of the General Counsel (OGC). DOE/FOI re-assigned the request to OGC, the office most likely to have the responsive document.

OGC conducted a search of its records and located a document responsive to EverNu's request. In its Determination Letter, OGC withheld portions of the document claiming that the responsive material was shielded under the deliberative process privilege of Exemption 5. Letter from OGC to EverNu, December 7, 2007 (Determination Letter). In withholding the information, OGC stated that the information withheld in the responsive document consists of deliberative material reflecting the process of formulating DOE's response to EverNu's September 21, 2005, and September 23, 2005, requests for assistance. *Id.*

On January 18, 2008, EverNu filed this Appeal of OGC's decision to withhold information under Exemption 5, arguing that the decision is untimely. Appeal Letter at 1-2. EverNu further argues that the DOE 1) failed to reasonably segregate the scientific material contained in the responsive document and 2) waived its right to claim the deliberative process privilege under Exemption 5 of the FOIA because the responsive material has been publicly disseminated. *Id*. at 2-3. We will address each of these issues in our discussion.

II. Analysis

A. OGC Determination Letter

In its Appeal, EverNu argues that OGC has failed to respond to its October 3, 2007, FOIA request in a timely manner[1] or provide an explanation for the delay. *Id*. at 1-2. EverNu argues that "[t]he FOIA permits an agency to extend the time limits up to 10 days in unusual circumstances....[and] [t]he agency [must] notify the requester whenever an extension is invoked..." *Id*. at 2. Further, EverNu maintains that it was never notified that unusual circumstances prevented the DOE from complying with the prescribed time limit. *Id.* Therefore, EverNu requests the release of all redacted portions of responsive document. *Id*. at 3.

This portion of EverNu's Appeal must be dismissed because the Office of Hearings and Appeals (OHA) does not have the jurisdiction over matters that relate to whether the agency has responded to a FOIA request in a timely manner. *See R.E.V. Engineering Services*, 28 DOE ¶ 80,180 at 80,678 (July 20, 2001) (Case No. VFA-0680) (dismissing appeal where no jurisdiction exists); *see also R.E.V. Engineering Services*, 28 DOE ¶ 80,136 at 80,580 (January 10, 2001) (Case No. VFA-0636).[2] Section 1004.8(a) of the DOE regulations grants OHA jurisdiction to consider FOIA appeals when: 1) the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request or 2) when the Freedom of Information Officer has denied a request for waiver of fees. 10 C.F.R. § 1004.8(a).

Section 1004.8(a) confers jurisdiction on OHA when an Authorizing Official has issued a determination that (1) denies a request for records, (2) states there are no records responsive to the FOIA request, or (3) denies a request for a waiver of fees. *See Suffolk County*, 17 DOE ¶ 80,111 at 80,524 (April 8, 1988) (Case Nos. KFA-0168 and KFA-0169). OHA has consistently held that Section 1004.8(a) does not confer jurisdiction when an appeal is based on the agency's failure to process a FOIA within the time specified by law. *See Tulsa Tribune*, 11 DOE ¶ 80,161 at 80,741 (February 29, 1984) (Case No. HFA-0207) (no administrative remedy for agency's non-compliance with a timeliness requirement). Accordingly, this part of EverNu's Appeal is dismissed.

[1] In response to EverNu's October 3, 2007, FOIA Request, OGC issued a Determination Letter on December 7, 2007, 44 days (excluding weekends and holidays) after the request was received.

[2] OHA decisions issued after November 19, 1996, may be accessed at http://www.oha.doe.gov/foia1.asp.

B. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding portions of documents from EverNu, OGC relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id*.

After reviewing the requested document at issue, we have concluded that OGC's determination in applying Exemption 5 was correct and consistent with the principles outlined above. The information withheld from EverNu is a memorandum containing comments and opinions drafted by a manager at EERE in response to an inquiry from an OGC attorney. The comments and opinions contained in the memorandum are clearly predecisional and deliberative. The memorandum was drafted to assist OGC in formulating the DOE's response to EverNu's September 21, 2005, and September 23, 2005, requests for assistance. In addition, the document reflects the opinion of a DOE manager regarding a proposed agency position. These comments and opinions were subject to further agency review and do not represent the final agency decision.

EverNu further argues that "[p]rotection for the decision-making process is appropriate only for the period while decisions are being made…[and that] [o]nce a policy is adopted, the public has a greater interest in knowing the basis for the decision." Appeal Letter at 3. We agree. However, in this case, protection under the deliberative process privilege of Exemption 5 is not lost because the DOE has neither expressly chosen to adopt the memorandum nor incorporated it by reference into a final agency determination. *See Ashfar v. Dep't of State*, 702 F.2d 1125 at 1140 (finding no protection when recommendation expressly adopted in post-decisional memorandum); *see also Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967, 973 (7th Cir. 1977) (ordering disclosure of an "underlying memorandum" that was "expressly relied [up]on in a final agency . . . document").

Accordingly, we hold that the comments and opinions withheld from the responsive material were properly withheld under the Exemption 5 deliberative process privilege.

C. Waiver

In its Appeal, EverNu suggests that even if the document is shielded by Exemption 5 of the FOIA, the DOE waived its right to withhold the responsive material because it previously disclosed the information to the public. Appeal at 3. EverNu's claim is based on the principle that if an agency has previously disclosed certain data, it may have waived its ability to later withhold the data under a FOIA exemption. *Carson v. Dep't of Justice*, 631 F.2d 1008, 1015 n.30 (D.C. Cir. 1980). Determining whether such a waiver has been made requires a careful analysis of "the circumstances of prior disclosure and . . . the particular exemptions claimed." *Carson*, 631 F.2d at 1015 n.30.

In support of its argument, EverNu provided OHA with an unsigned version of the document it is seeking. This document appears to be a final draft of the responsive memorandum. In providing this information, EverNu has established that the responsive information is duplicative of the information that exists in the public domain. *Ashfar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983) (the burden is on the requester to establish that the requested information is duplicative of the disclosed information).

Courts have routinely held that an agency has waived is protection under a FOIA exemption where there has been an official disclosure or direct acknowledgment by authorized government officials. Thus, waiver of the privilege to withhold information under the FOIA depends upon prior official release of the information or disclosure under circumstances in which an authorized government official allowed the information to be made public. *See Wolf v. CIA*, 473 F. 3d 370, 379-380 (D.C. Cir. 2007) (holding that an agency waived its ability to refuse to confirm or deny the existence of responsive records pertaining to an individual because a top agency official had discussed that individual during congressional testimony); *see also Simmons v. Dep't of Justice*, 796 F.2d 709, 712 (4th Cir. 1986) (unauthorized disclosure does not constitute waiver).

OGC has informed OHA that the responsive memorandum has never been officially disclosed to the public. *See* Memorandum of Telephone Conversation between Jocelyn Richards, Attorney-Adviser, OGC, and Avery Webster, Attorney-Examiner, OHA (dated February 21, 2008).

Based on the foregoing, we find that the DOE has not authorized the release of the responsive material to the public and, therefore, no waiver of protection under the deliberative process privilege of Exemption 5 has occurred.

D. Segregability

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (August 15, 1995) (Case No. VFA-0060).

In the Appeal Letter, EverNu argues:

> [C]ourts routinely consider scientific deliberation to be objective interpretations of technical data[] [f]inding that disclosure of scientific deliberations is not equivalent to revealing an agency's deliberative processes regarding policy matters . . . and that purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only "those internal working papers in which opinions are expressed and policies formulated and recommended."

(*quoting Ethyl Corp. v. EPA*, 478 F.2d 50, 48-50 (D.C. Cir. 1983)).

Exemption 5 covers scientific reports that constitute the interpretation of technical data, to the extent that the "opinion of an expert reflects the deliberative process of decision or policy making." *See Parke, Davis & Co. v. Califano*, 623 F.2d 1 at 6 (6th Cir. 1980) (protecting opinions and objective evaluations of scientists engaged in interpreting technical and scientific data where the opinion reflects the deliberative process of decision or policy making).

In the case at hand, the majority of the material withheld under Exemption 5 is non-factual in nature and is composed of the preliminary opinions of a DOE manager as to the validity of the allegations EverNu raised in its earlier request for assistance. Further, the scientific information contained in this document is presented by the DOE manager in support of his opinion. Notwithstanding the holding in *Ethyl Corp.*, the factual information, including scientific analysis, contained in the responsive document is so intertwined with the DOE manager's opinion as to make any segregation virtually impossible. *See Lead Industries Ass'n. v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979); *see also Radioactive Waste Management Associates*, 28 DOE ¶ 80,152 (March 2, 2001) (VFA-0650).

E. Public Interest Determination

The fact that the requested material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

In this case, no public interest would be served by release of the withheld material in the document at issue, which consists of comments and opinions provided to the OGC to assist in the process of formulating an agency response. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (March 18, 1987) (Case No. KFA-0080).

Based on the foregoing, we have determined that OGC properly withheld the document pursuant to the deliberative process privilege of Exemption 5.

III. Conclusion

As discussed above, EverNu's claim of an untimely response to its FOIA request is hereby dismissed. In addition, we find that OGC properly withheld the responsive material pursuant to the deliberative process privilege of Exemption 5 of the FOIA. Finally, we find that the prior unauthorized disclosure of responsive information does not constitute a waiver of OGC's application of Exemption 5 in these circumstances. Therefore, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by EverNu Technology on January 18, 2008, OHA Case No. TFA-0243, is hereby dismissed in part and denied in part.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 5, 2008